IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 810

THE CARTER OIL COMPANY, A CORPORATION,
Petitioner,

vs.

HARLAN B. RAMSEY AND RUBY RAMSEY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS.

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STATEMENT OF MATTER INVOLVED.

A brief statement of facts is deemed necessary to correct inaccuracies and omissions in petitioner's statement.

Respondents (plaintiffs) are the owners of forty acres of land situated in a Fayette County oil field, except an undivided one-half interest in the oil and gas underlying the east twenty acres belonging to one Leavy, but subject to an oil and gas lease given by them June 5, 1936 to one Von Almen, as lessee, who subsequently assigned to petitioner (defendant), The Carter Oil Company. By the ex-

press terms of the instrument, respondents leased the tract "for the sole and only purpose of mining and operating for oil and gas and of laying of pipe lines and of building tanks, power stations and structures thereon to produce, save and take care of said products" (Tr. 9-10).

On August 16, 1938, the petitioner procured a lease of the Leavy mineral interest which, unlike the lease from respondents, specifically authorizes the repressuring of subsurface formations and further provides that the leasehold may be so operated "alone or conjointly with neighboring lands" (Tr. 22-23).

The petitioner then communitized these two leaseholds by procuring an instrument authorizing their development as a single unit and a satisfaction of the royalty obligations by dividing a one-eighth part of the oil production between the lessors in the proportions of their respective mineral ownerships, that is, three-fourths to respondents and one-fourth to Leavy (Tr. 27).

The forty acre tract is in the midst of a large and fully developed oil field composed of varying sized parcels, all subject to respective oil and gas leases, the great majority of which are owned and operated by the petitioner, including those immediately adjacent to the east, west and south. A few of the leaseholds, including the one so adjacent to the north, are owned and operated by the Magnolia Petroleum Company (Tr. 141).

The forty acre tract has been developed by the drilling and completion of four wells. Pursuant to custom they are regularly spaced, that is to say, one well is located in the approximate center of each quarter thereof so as to adequately drain and produce the surrounding ten acres (Tr. 36, 37). Each of the wells is producing oil in paying quantities and by the present method of operation (without repressuring) will continue so to do for more than ten years

or beyond the year 1960 (Tr. 52). The continued operation of all four wells is necessary for the production of oil from the entire "leasehold" and for the adequate protection of the tract against drainage by offset wells on adjacent premises, that is, the Magnolia Petroleum wells to the north and petitioner's wells to the east, west and south (Tr. 37-39). The petitioner has failed to "clean out" the particular well here involved (being the one situated in the northwest quarter of the 40 acres) since the month of August, 1942 (Tr. 187).

In August of 1945 the petitioner and the Magnolia Petroleum Company entered into a contract "for a field repressuring project" whereby each agreed to convert certain producing wells to gas input wells and operate them as such (Tr. 133-141). The well situated in the northwest quarter of the respondents' forty acre tract is one of the wells proposed to be so converted (Tr. 141). Its operation as a gas input well will actively force substantial quantities of oil from respondents' land, including all of the recoverable oil underlying the northwest five acres or a one-eighth of the entire tract (Tr. 39-40, 73, 113, 174).

Upon the subject of secondary recovery, through gas repressuring, witness Hager testified, among other things, that the forced oil migration from respondents' premises could be avoided by the continued operation of the four producers and the drilling of a new or special well for gas injection purposes either in the center or, preferably, in the extreme northwest corner of said tract (Tr. 40-42). A few of petitioner's witnesses testified that such an injection well would be too close to the producers and therefore more likely to result in "channeling" (Tr. 119, 146, 158, 176), but Mr. Hager thereupon testified that the well distances would still be ample for efficient operation and especially so because of the operator's ability and position to actually control the gas injection pressure (Tr. 191).

Petitioner's witness Flood admitted that throughout his extensive repressure experience, as engineer for Ohio Oil Company, the repressure wells had averaged one to each thirty-four acres rather than one to eighty acres as proposed by petitioner (Tr. 185-186). Petitioner's witness Gustafson specifically testified that the drilling of a gas input well was undesirable primarily because of the additional cost involved (Tr. 107) and, also, that a gas injection program is "of necessity" a flexible one (Tr. 97) and, further, that a special input well could be drilled on the forty acres without injury to the producing wells, although it would probably call for some rearrangement of the pattern (Tr. 106-107).

Mr. Gustafson further testified that the repressure well pattern had been "arbitrarily" selected (Tr. 92, 93), and, further, that the additional cost for the drilling of a special input well would be in the neighborhood of $11,400.00 (Tr. 92).

Respondents instituted their injunction suit in the Circuit Court of Fayette County, Illinois from whence, at the instance of petitioner, it was removed to the United States District Court, for the Eastern District of Illinois. The complaint consists of three counts respectively charging the threatened well destruction and conversion to be unlawful because:

I. Such would be in violation of the lessee's covenant to fully develop and operate the leasehold;

II. Such would be in violation of the lessee's covenant to duly protect the leased land against offset drainage by producing wells on adjacent lands; and

III. Such would result in the actual forcing of substantial quantities of oil from respondents' land and, therefore, constitute an act unauthorized by the lease pursuant to which the petitioner is solely dependent for its right to operate upon respondents' forty acre tract.

The petitioner's answer admits all material allegations of the complaint except that the threatened well conversion is unauthorized by the lease or will result in the loss of substantial quantities of respondents' oil (Tr. 13-17). The answer also contains an affirmative defense whereby it is alleged that the gas input wells "have been and will be scientifically spaced so as to render fair and equal service to all producing leases throughout the area affected to the end that injustice will not occur but that the ultimate production from all of the leases will be enhanced and both operators and royalty owners will be the beneficiaries of such program and no royalty owner will suffer damage" or, in substance, that the respondents will suffer no damage and, therefore, have no cause for complaint (Tr. 17-22).

This case has not presented and does not present the issue as to whether a lessee is entitled to engage in the secondary recovery of oil and gas through gas injection or the issue "as to whether the lessee in an oil and gas lease has the right to select the plan and method of operation, provided he act as a prudent, competent and experienced operator having in mind the interest of both lessor and lessee". (Petition for Certiorari, 1.)

The True Issue Involved.

The true issue involved in this case has been and is: Whether the petitioner, in connection with an oil field repressure program, has the legal right to convert the well, situated on the northwest quarter of respondents' forty acres, from a commercial producer to a gas injection well, for the announced purpose of prolonging the life and enhancing the ultimate oil recovery of the three remaining producing wells, even though or when:

A. The continued production of the four wells is essential to the adequate production and drainage of oil from the forty acres;

B. The continued production of the well, proposed to be converted, is essential to the protection of respondents' forty acres from undue drainage by offset wells situated upon immediately adjacent lands;

C. The petitioner is under a legal duty, by covenants implied, to adequately develop and produce oil from the entire forty acres and duly protect the entire tract against drainage by "offset wells" on adjacent premises which legal duty will be violated by the proposed well conversion;

D. The proposed well conversion will result in the actual forcing of substantial quantities of oil from respondents' forty acres to adjoining premises including all of the recoverable oil from the northwest five acres, or a one-eighth part thereof;

E. The lease given by respondents relates only to the forty acres and does not authorize its operation "conjointly with neighboring land" or the active forcing of oil onto adjoining premises and does not provide that it may be so used or operated in connection with an oil field repressure program;

F. Such forcing of substantial quantities of oil from respondents' premises can be avoided by the continued operation of the four producing wells and the drilling and proper operation of a gas input well situated in the center or in the extreme northwest corner of the forty acre tract;

G. The petitioner is the lessee on adjoining tracts and, by reason of its operation of offset wells and the input well pattern of its contract with Magnolia Petroleum Company, would lose nothing by the forced oil migration, whereas the respondents are not in such fortunate position to recoup the loss of their oil; and

H. The proposed conversion would deprive the respondents of a commercially producing oil well, whereas many of the lessors of nearby premises would receive the benefits of repressuring without loss of a producing well.

Opinions of District Court and Court of Appeals.

The District Court's consideration and determination of this case are correctly set forth in its findings, conclusions and memorandum opinion (Tr. 198-208; Petition for Certiorari 23-26). They are not subject to the strained interpretation which petitioner asserts and attempts to demonstrate by the quotation of limited or isolated excerpts. From a consideration of the evidence, the equities were resolved in favor of the respondents and against the petitioner. In short, it was determined that, under the facts as established by the evidence, the threatened well conversion is not the act of a prudent, competent and experienced operator having in mind the interest of the lessors (respondents) although it is admittedly so from the standpoint of the lessee (petitioner) and notwithstanding the conclusion that the petitioner has the right to properly engage in the secondary recovery of oil through gas injection.

In the Court of Appeals the cause resolved in the final issue as to whether "plaintiffs are the owners of the underground oil on their premises", because of the admissions of petitioner's answer; findings of fact which, upon the record, are not subject to legitimate dispute upon appeal; and the petitioner's extended argument that, under the Illinois law, respondents by their lease have given the lessee all of their right and title to the underlying oil and gas and, therefore, are not in a position to charge a waste or depletion of an estate in oil and gas (Tr. 266-268).

THE REASONS GIVEN BY PETITIONER FOR THE ALLOWANCE OF THE WRIT ARE WITHOUT MERIT AND ARE INSUFFICIENT.

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1. The decision of the Court of Appeals in confirming the injunction of the District Court in this case is not in conflict with the decision of the Court of Appeals for the Tenth Circuit in the case of *Utilities Production Corporation* v. *Carter Oil Company*, 72 Fed. (2d) 655. The matter involved is not the same and the two cases do not present the same questions either of law or fact. Furthermore, if there were a conflict between the two opinions, which we deny, such would not be ground for certiorari (See Argument, Part III, last paragraph).

2. The decision of the Court of Appeals in this case is not erroneous and does not have the effect of preventing the secondary recovery of oil by an approved method, and does not involve a question of public importance in the conservation of natural resources and for public safety in case of war.

ARGUMENT.

I.

THE DISTRICT COURT CORRECTLY DECIDED THE CASE.

A. The Judgment of the Trial Court Is Fully Supported by the Settled Law and the Evidence.

It has been and is respondents' position that the petitioner should be enjoined from the threatened abandonment of the commercially producing oil well and its conversion to a gas input well for three distinct reasons: First, the petitioner is under a legal duty to operate such well so long as it can be done at a reasonable profit and continues to be essential to the adequate recovery of oil from the entire forty acre tract or the ten acre location which it serves; Second, the petitioner is under a legal duty to operate such well so long as it can be done at a reasonable profit and continues to be essential for the protection of respondents' forty acres and particularly the ten acre location which it serves, against "off-set drainage" by a well or wells on adjacent lands; and, Third, the threatened operation will result in the actual driving of oil from the respondents' land which is an act wholly unauthorized by the oil and gas lease in question. Any one of these reasons fully justifies the injunctive relief which has been granted.

It is the settled law in Illinois that an oil and gas lessee is under a legal duty to: (1) fully develop and operate the leasehold; and (2) drill and maintain sufficient wells for the protection of the leased premises against drainage by offset wells on adjoining lands, provided, of course, a fair profit from the operation can be anticipated. Even though the particular lease may not expressly so provide, such duty exists with the same force and effect by covenant implied.

In *Summers Oil and Gas,* Perm. Ed. Vol. 2, sec. 398 at page 333, the author treating the first of these obligations, states:

> "In the absence of an express stipulation creating a duty to proceed with drilling after the discovery of oil and gas in paying quantities, the law to accomplish the manifest intention of the parties, in leases where the principal consideration is royalties to be paid the lessor, implies a duty on the part of the lessee to reasonably develop the premises."

The rule as so stated has been uniformly applied by the Illinois Courts in the following cases: *Daughetee* v. *Ohio Oil Co.*, 263 Ill. 518, 523; *Powers* v. *Bridgeport Oil Company,* 238 Ill. 397, 402; *Simpson* v. *Adkins,* 386 Ill. 64.

The implied duty on the part of the lessee to protect the leased premises from drainage by offset wells is equally well established. In *Summers Oil and Gas,* Perm. Ed. Vol. 2, Sec. 399, at page 338 it is said:

> "Because of the fluidity of oil and gas and the likelihood of their being withdrawn from the demised land by the operation of wells on adjoining lands, the courts uniformly hold that, in absence of an express covenant of the lease creating a duty in the lessee to drill wells offsetting those on adjoining lands from which oil and gas are produced in paying quantities, the law implies such a duty."

Where the lessee is the owner and operator of such adjacent leases, and therefore unaffected by migration across the lease lines, he is under a special duty to drill such offset wells. *Powers* v. *Bridgeport Oil Co.*, 238 Ill. 397, 402; *Humphreys Oil Co.* v. *Tatum*, 26 F. (2d) 882, 884. Certiorari denied 278 U. S. 633.

A covenant implied is of the same force and effect as though it were an express provision of the instrument. *C. & W. I. R. R. Co.* v. *C. & E. I. R. R. Co.*, 260 Ill. 246, 258.

It is also fundamental and the settled law that, in the event of silence or ambiguity, an oil and gas lease is construed most strongly in favor of the lessor and against the lessee. *Thornton Oil and Gas,* Fifth Ed. 1944 Supp. Vol. 1, sec. 133, page 33; *Bettman* v. *Harness,* 42 W. Va. 433; 21 S. E. 271; 36 L. R. A. 566; *McClanahan Oil Co.* v. *Perkins,* 303 Mich. 448; 6 N. W. 2d 742.

The lease here under consideration covers *only* the forty acres and *does not* contain the frequent provision that it may be developed, maintained and operated "alone or conjointly with neighboring lands". Furthermore, it contains no provision, express or implied, whereby the lessee is authorized to sacrifice a substantial quantity of the underlying oil and gas or otherwise deplete the estate in the promotion of a field repressure program or to save the relatively small expense of drilling a special gas injection well.

With reference to "custom and usage," the petitioner's evidence was limited to the secondary recovery through gas repressuring as a *general proposition.* There is no proof that small independent leaseholds are customarily thrown into large field repressuring programs without regard to forced oil migration between boundary lines or the covenants of the particular lease involved. Of course, such proof could be of no avail herein because of the settled law of Illinois that the clear terms of a grant cannot be varied by evidence of custom and usage. *Ambarann Corp.* v. *Old Ben Coal Corp.,* 395 Ill. 154, 164.

The proper application of the foregoing legal principles are clearly demonstrated by the District Court's Findings numbered 5, 6, 7, 12, 13, 14, 15 and 16 (Tr. 202-205).

The evidence, supporting such Findings, includes the following: (a) The testimony that the four wells upon respondents' forty acres are commercially producing oil and, by the present method, can be profitably operated until, at

least, the year 1960 (Tr. 52); (b) the testimony that the four wells are producing thirty-four barrels of oil per day of which the well that petitioner proposed to destroy and convert is producing approximately six barrels though it has not been "cleaned out" since the month of August, 1942 (Tr. 187); (c) the testimony that all four wells upon respondents' forty acres and their continued operation are essential to the adequate drainage and production of oil from said premises (Tr. 36-37); (d) the testimony that the well in question or its continued production is essential to the customary and adequate protection of respondents' land against unnecessary drainage by "offset wells" situated on immediately adjacent lands (Tr. 37-39); (e) the testimony of respondents' witness Hager and the admissions of petitioner's five engineer witnesses that the threatened well conversion will actually operate to force recoverable oil from respondents' land including all of the recoverable oil from the Northwest five acres (Tr. 39-40, 73, 113, 147, 174); (f) the testimony of witness Hager that the forced oil migration from respondents' premises can be avoided by the continued operation of the four producers and the drilling of a new or special well for gas injection purposes either in the center or, preferably, in the extreme Northwest corner of the tract (Tr. 40-42), and his further testimony that the well distances would still be ample for efficient operation and especially so because of the operator's ability and position to actually control the gas injection pressure (Tr. 191); and (g) the testimony of petitioner's witness Gustafson that such a special input well can be drilled on the forty acres without injury to the producers although he considers it undesirable because of the cost involved (Tr. 106-107).

B. Petitioner's Points of Argument Are in Direct Conflict With the Record and Have No Application Herein.

The factual issues presented at the trial included: (a) whether the threatened well conversion will result in the loss of substantial quantities of respondents' oil; (b) whether the threatened well conversion is reasonably required for an enjoyment, by lessee, of the rights granted by the oil and gas lease; and (c) whether the threatened well conversion is a reasonable and prudent operation having in mind the interest of the lessors as well as the lessee.

After hearing and considering all of the evidence the District Court resolved these issues and found the facts in favor of the respondents and against the petitioner. In other words, the Court has found that the threatened depletion of respondents' estate in oil would constitute a substantial or "legal waste", that is to say, a waste of which they may properly complain; has further found that such well conversion is not reasonably required; and has further found that such well conversion is not the act of a reasonable and prudent operator having in mind the interest of the lessor.

The petitioner alleged by way of affirmative defense that its field repressure program will render fair, equal and just service to all, that no royalty owner will suffer damage, etc., (Tr. 17-22); but petitioner failed to establish such defense and the trial court so found. The propriety of such finding is made quite obvious by the disproportionate penalties and benefits as between respondents and the similar lessors within the area who will receive the benefits without the sacrifice of a producing well; and the petitioner's singular position to recoup the "migrated oil" upon or from its other leaseholds (Tr. 141).

Throughout the trial of this case and in the Court of Appeals, petitioner asserted that respondents possess no

title to the underlying oil and gas but only the right to recover it; that by the oil and gas lease, all such right has been given petitioner; and, therefore, respondents are in no position to so complain. Since the Court of Appeals' decision, petitioner has been contending that the nature of respondents' ownership or oil and gas estate has nothing to do with this case. In this the petitioner is clearly mistaken. Whether respondents own all of the underlying oil, a one-eighth part of it or have no title at all is quite material and goes to the very substance of this litigation. The law of Illinois, upon this subject, is well settled and most recently pronounced in the case of *Central Pipe Line Company* v. *Hutson*, 401 Ill. 447 wherein, at pages 449-450, it is specifically stated: "Oil before being separated from the land is a mineral and *is a part of the land* (*Jilek* v. *C. W. & F. Coal Co.*). A mining lease only gives to the lessee the right to find and reduce minerals to possession, *the title to the minerals remaining in the lessor just as long as they remain in the land.*"

Petitioner's arguments "that the loss of oil complained of is not a legal waste", that the decisions do violence to the "prudent operator's rule" and that the extent of respondents' oil estate is of no consequence, are wholly inapplicable for want of the necessary factual support.

The remaining sections hereof will demonstrate that the cause has been duly considered and determined by the Court of Appeals and does not present any matter of great importance or that merits the consideration of this Honorable Court.

II.

THE COURT OF APPEALS DULY CONSIDERED AND PROPERLY AFFIRMED THE JUDGMENT OF THE TRIAL COURT.

When this cause reached the Court of Appeals for consideration there were certain material facts, in addition to those admitted by the pleadings, which were established by the Findings of the District Court and not subject to legitimate attack upon appeal because of the abundance of supporting evidence. Such Findings included: (a) the fact that the continued maintenance and operation of the commercially producing oil well is essential to the adequate production of oil from respondents' forty acres and due protection of the tract against offset drainage; (b) the fact that the threatened well conversion will cause a substantial loss of oil from the forty acre tract; (c) the fact that the threatened well conversion is not reasonably required by petitioner for the full enjoyment of the rights granted by the lease; and (d) the fact that the threatened well conversion is not the act of a prudent oil operator having due regard for the lessor.

The District Court's decision could and doubtless would have been affirmed solely upon the basis of such Findings but for the petitioner's position that respondents have no title to the underlying oil and gas and, therefore, the threatened well conversion and depletion of the underlying oil cannot be a violation of their fundamental property rights. In this respect, petitioner argued as follows:

> "The opinion of the court shows that it concluded that in Illinois the oil belongs to the plaintiff and that lessee has no right to drive the oil from the plaintiffs' land by any method and to do so would be a trespass upon and a violation of the plaintiffs' right and title to the oil in place.
>
> In this conclusion the court erred.

> The Supreme Court of this State, in *Jilek* v. *C. W. and F. Coal Company,* 382 Ill. 241, said at page 284: '* * *'
>
> Therefore, it is not correct to say that the owner of the land owns or has title to the oil and gas before it is reduced to possession. He does not own a specific cubic foot of it. He does have the right to explore for it and reduce it to his possession and he has the right that no other person shall take or interfere with the oil and gas under his land, by operations conducted thereon without his consent.
>
> But he does have the right to make a lease to others to do what he himself could do, *i. e.,* explore for and reduce the oil and gas to possession.
>
> That is exactly what the plaintiffs did in this case. They executed the lease now held by the defendant, and that lease gave *all the rights that the plaintiffs ever had to explore for and recover possession of the oil and gas. So the defendant stands in the plaintiffs' shoes so far as the question of title to the oil and gas is concerned.*
>
> It is therefore, obvious that the reasoning of the court as to the title to the oil and gas being in the plaintiffs is erroneous." (Tr. 267-268.)

Consequently, upon the record and by petitioner's own position, the final and "deciding factor" of the appeal was and "is whether plaintiffs are the owners of the underground oil on their premises".

The trial court specifically held that the proposed conversion would constitute and be a continuing trespass against respondents' property rights in the premises and the underlying oil and gas (Tr. 207). Upon this conclusion the petitioner assigned error (Tr. 224) and strenuously argued, in attempted support thereof, as above set forth.

The Court of Appeals fully recognized and correctly applied the settled law of Illinois that "a mining lease only gives to the lessee the right to find and reduce minerals to

possession, *the title to the minerals remaining in the lessor just as long as they remain in the land.*" *Central Pipe Line Company* v. *Hutson,* 401 Ill. 447, 449-450; *Updike* v. *Smith,* 378 Ill. 600, 604; *Triger* v. *Carter Oil Company,* 372 Ill. 182, 185; *Watford Oil and Gas Co.* v. *Shipman,* 233 Ill. 9, 12; *Poe* v. *Ulrey,* 233 Ill. 56, 62.

It cannot be logically said or argued that the Court of Appeals has failed to give this case the deserved consideration.

III.

THE DECISION IS NOT IN CONFLICT WITH THE DECISION OF THE COURT OF APPEALS FOR THE TENTH CIRCUIT.

One of the two errors relied on by petitioner is that the decision of the Court of Appeals for the Seventh Circuit in the instant case is in conflict with the decision of the Court of Appeals for the Tenth Circuit in *Utilities Production Corporation* v. *Carter Oil Company,* 72 F. (2d) 655.

To assign an alleged conflict between the two opinions, as one of two errors relied on, reveals a desperate attempt by the petitioner to find any basis whatever for seeking a writ of certiorari.

The Utilities Production case is a suit between the oil lessee and the gas lessee of the same tract to determine whether the oil lessee had the right, under the leases and the regulations of the Interior Department, to use residue gas in the repressuring of oil wells. The lessor was not a party to the suit and the court on its own motion, raised the question of the lessor's rights, and held on pages 660, 661 and 662 of its opinion that the lessor was not a necessary party, that the decree was not binding on it and would not be a bar to any subsequent suit brought by the lessor.

Such a holding, of course, left entirely untouched the question of the right of an oil lessee, as against the lessor,

to engage in a repressuring program which would cause the migration of a substantial quantity of oil from the lessor's land, and which would deprive the lessor of a commercially producing oil well.

Petitioner correctly states on page 18 of its petition that there was no contention in the Utilities Production case of loss of oil by migration. Neither was there any contention that the lessor would be or was being deprived of a commercially producing well, necessary to fully develop the premises and to protect the lessor against draniage by offset wells on adjoining lands. Such differences in the factual situations and the contentions made in the two cases go to the very heart of the instant case. For petitioner to minimize such differences in the two cases, reveals that it does not or chooses not to understand that the respondents did not abdicate all of their property rights when they gave their oil and gas lease.

A further and controlling reason why the Utilities Production case did not and could not involve any of the same material questions as are involved in the instant case, and therefore can present no conflict between the courts of appeal of the two circuits, is that this case involves a 40 acre tract, whereas the lessor in that case was an Indian Tribe which, the opinion reveals, owned at least 166,400 acres.

The inequitable features of the repressuring program to which the respondents object, arise largely because the respondents are owners of a small tract located within a very large area controlled by the petitioner as lessee. If the respondents were the owners of a great area including and surrounding the oil producing area, as was presumably the situation of the Tribe in the Utilities Production case, practically any program of repressuring, which the petitioner in its own interest might impose, would be satisfac-

tory, since the interests of lessor and lessee in such program would be identical. However, in the case of a small tract owned by a lessor, virtually surrounded by other lands also being operated by the same lessee, the interests of the lessor and lessee in a repressuring program are in definite conflict. In such a situation, oil migrating or drained from the lessor's small tract is forever lost to him, while the lessee merely produces the lost oil through its wells on adjoining lands, from which the small lessor does not share the proceeds.

The only point in the Utilities Production case which the petitioner saw fit specifically to call to this Court's attention is the dicta that a lessor could justly complain if inefficient operation resulted from the lessee's failure to use improved methods which came into common use during the terms of the lease. Neither the opinion of the District Court nor the opinion of the Court of Appeals in this case (either directly or by implication) have disagreed with such dicta. The respondents have always conceded that secondary recovery by gas injection has been an approved practice in proper situations for many years prior to the lease granted by the respondents herein. The opinion of the District Court and the Court of Appeals of the Seventh Circuit in this case, also recognize such fact and by dicta agree with the court in the Utilities Production case that it is the lessee's duty to use appropriate repressuring methods.

However, the court in the Utilities Production case did not say, and no other court has ever said, that it is the lessee's duty to engage in a repressuring program which would be inequitable to the lessor or which would violate covenants of the lease to fully develop and protect the premises from drainage by offset wells.

We submit that there is no conflict between the decisions

of the Courts of Appeal for the Seventh and Tenth Circuits.

Furthermore the instant case involves the settled law of Illinois, while the Utilities Production case arose in Oklahoma. If there be any conflict between the two opinions of the Courts of Appeal, which we deny, the conflict, if any, arose from application of variant state law, which is binding on the Federal Courts under the doctrine of *Erie Railroad Company* v. *Tompkins,* 304 U. S. 64. Such a conflict, if any, is not ground for certiorari. *Ruhlin* v. *New York Life Insurance Company,* 304 U. S. 202, 205-206.

IV.

THE DECISION IS NEITHER ERRONEOUS NOR OF PUBLIC IMPORTANCE IN THE CONSERVATION OF A NATURAL RESOURCE.

It has been heretofore demonstrated that the decision of this case is correct and firmly supported by the law and the evidence.

The petitioner's assertion that "the effect of this decision creates a paradox" is simply a product of the art of misconstruction and fallacious analysis in which it has presumed to engage.

That oil recovery through gas repressuring is an approved method which a lessee has the right and probably implied duty to pursue or, generally speaking, a method which would be adopted by a prudent, competent and experienced operator, "bearing in mind the interest of both lessor and lessee" is neither determinative of the case nor to any degree inconsistent with the ultimate conclusion reached by the decision. Furthermore, it is not of material import that the threatened well conversion might increase the efficiency of the three remaining wells or that, in

the future, petitioner may attempt to force upon the land of respondents some of their neighbor's oil; and it is indeed obvious that the petitioner lessee has not been charged with a duty to prevent all or any unavoidable oil migration across leasehold boundaries.

The material point which the petitioner consistently ignores is that, *under the facts and circumstances here presented,* the conversion of *this particular well* is unlawful for the reasons charged. In arriving at such conclusion the Trial Court well recognized the disproportionate penalties and benefits of the project as between the respondents and other lessors of lands within the area; and, also, the fact that the project can be made more equitable by placing the repressure well on a larger tract or by the drilling of a special and equally efficient repressure well in the center or, preferably, at the extreme northwest corner of the forty acres.

The United States Bureau of Mines Report on the Function of Natural Gas in the Production of Oil, by H. G. Miller, states:

> "Although it is conceivable and probable that many operators will cooperate in gas injection programs, still *the problem of lessors' rights must be solved before the gas drive can receive wide application in many fields.* This problem may be the most troublesome in endeavoring to reach operating agreements for cooperative action, particularly in town-lot areas or in fields of a number of different ownerships." (Tr. 132.)

It is fundamental that a fair and equitable secondary recovery program requires the pooling or communitization of these smaller leases or tracts, whereby the respective lessors will receive their proportionate share of the total royalty oil, regardless of the particular tract to which it is driven or where it is actually recovered. In Illinois, such must be done with the consent of the various parties con-

cerned, including the lessors. Some forms of leases contain a special provision whereby the lessor so authorizes. Of course, the petitioner does not want to bother with such procedure. Its expert witness Mylius testified in the first instance, that "definitely I consider it a disadvantage to consider the royalty owners in these projects" (Tr. 170).

The petitioner asserts that the suggested unitization of an area for a repressure system (equitable to the lessors as well as the lessee) is a practical impossibility because of the large number of persons involved. Such assertion is apparently unsound. By the same process of reasoning it could be argued that oil companies should be permitted to enter upon a person's land and produce oil therefrom without the necessity of procuring any lease at all.

Respondents have never objected to a secondary recovery or repressuring program. They are unalterably opposed, and justly so, to the sacrifice of a substantial part of their oil estate in furtherance of petitioner's field repressuring program—especially where the benefits are so disproportionate and where they have not leased the forty acre tract for operation "conjointly with neighboring lands". To facilitate petitioner's operations respondents readily communitized "their lease" with the separate lease from Leavy covering his one-half interest in the oil and gas underlying the east half of the forty acres (Tr. 27-30). To facilitate secondary recovery they have been perfectly willing to communitize their property with the surrounding tracts, which are to be benefited or served by the proposed well conversion and thereby participate in the total oil production upon an area or pro rata basis. Such procedure is fair, reasonable and customary where relatively small tracts are involved.

Should the petitioner be unalterably opposed to further communitization, let it reduce the migration to a minimum

by drilling a special repressure well in the extreme northwest corner of the forty acres such as Division Engineer John D. Gustafson admits would be practical and profitable but considers undesirable, from petitioner's standpoint, because of the additional expense involved (Tr. 106-107). As a further alternative, the petitioner and the oil industry may go to the Illinois Legislature for a secondary recovery communitization law, such as exists in other states, whereby the rights and interests of all can be proportionately and adequately protected.

The Legislature of Illinois has provided a statutory proceeding whereby the owners of at least 51% of the oil and gas underlying a tract of land may go into court and obtain leave to prospect for and produce such oil and gas—in which event the "interests" who have failed or refused to lease or agree to the proposed operation are duly protected (secs. 25-33, ch. 104, Ill. Rev. Stats., 1947 Bar Ass'n Ed.). If such is not sufficiently broad to require due unitization essential to an equitable secondary recovery program the legislature should again be requested to provide a proper remedy of the situation and, doubtless, will be glad so to do.

The petitioner has been unable to cite any case where oil and gas lessors have been subjected to a repressure program of this character, and we are aware of no other instance where an oil company or operator has attempted to so usurp the contractual and property rights of others as evidenced by the particular facts and circumstances here presented.

Conclusion.

The Petition for Writ of Certiorari fails to demonstrate any valid reason as to why this case should be the subject of further review. We therefore submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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